P.W. 3 who was believed was not that of an accomplice, nor was the failure to produce a report against the accused fatal to the prosecution case in this case. But finally the learned judge allowed the appeal and quashed the conviction. In our view the judgment of the learned judge was not as clear as it should be. He failed to refer for instance to the evidence of P.W. 3, except to say that such a person is not an accomplice whose evidence would require corroboration. The learned judge then went on to say as follows: —

"The trial court in its judgment speaks of inferences drawn from the conduct and behaviour of accused and particular pieces of evidence such as meeting at hospital, the bus station, the suspension bridge and the handing back of insurance certificate that very night and the fact that accused failed to stop immediately when ordered to do so. To be valid, inferences must comply with two conditions. First, it must account for all the known facts and secondly it must be the only reasonable inference which will account for all these facts."

He then referred to how a court should consider where facts lead to more than one inference and in our view with respect, quite rightly said that in such instances an inference most favourable to an accused person should be adopted.

Finally, the judge came to the view (and I quote him):

"Much is made of accused's movements on the 11th December, 1968 but to my mind there is nothing that he did on that day which is incapable of innocent explanation. In dealing with a case of the present description therefore depending on inferences mere conjecture cannot be allowed to take the place of legal proof of facts by the prosecution."

With respect, we disagree with the learned judge that the evidence against the accused was dependent merely on inferences of facts. As we explained previously the case against the accused was dependent upon the evidence of P.W. 3 and his evidence was supported by other evidence.

There is another point we should mention. The learned judge seemed to be strongly influenced by the fact, as he put it, that the accused had specifically noted the number of the insurance policy in the station diary. It was pointed out to us that that finding made by the learned judge was wrong. The only evidence in reference to this was that of the accused himself who stated "I copied the number of the insurance policy etc. at the back of his statement." We were referred to Exhibit P. 6 — the relevant station diary, containing an entry made by the accused in reference to the accident. There is no reference to P.W. 3 or the fact that he was driving a motor cycle without a third party risks insurance. We therefore come to the conclusion that the learned judge on the evidence was wrong in quashing the conviction. An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. As Lord Diplock had stated in *Tan Chow Soo* v. *Ratna Ammal*[1]:—

"An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

It is also obvious that the learned judge had been seriously influenced by his assumption, which we have explained was wrong, of the existence of the entry about the insurance policy in the station diary and had he been aware of his mistake he might have decided the appeal differently.

We would therefore say that the answer to the reference is in the negative. In the circumstances we set aside the judgment of the learned judge and restore the conviction and sentence made by the learned magistrate.

Answer in the negative.
Conviction and sentence restored.

RINYA ANAK KASSI v. WONG SIE KING

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo), Lee Han Hoe J.)
April 16, 1970]

[Kuching — Federal Court Civil Appeal No. 2 of 1970]

Practice and Procedure — Action against estate of deceased person — Requirement that cause of action arose not earlier than 6 months before the death of the deceased — Sarawak Application of Laws Ordinance (Cap. 2), ss. 2 & 3 — Law Reform (Miscellaneous Provisions) Act, 1934, s. 1(3) (b) — Whether Act applies in Sarawak — Law of general application.

The plaintiff's taxi was involved in a collision with a car driven by one Kadam. The taxi was a total wreck as a result of the accident. About nine months later Kadam was fatally injured in another accident. After the grant of representation to his estate the plaintiff commenced an action against the defendant as administratrix of the estate of the deceased claiming damages for the loss of his taxi. The defendant in her defence denied negligence and pleaded that the claim was barred by the Law Reform (Miscellaneous Provisions) Act, 1934. The objection in law was taken as a preliminary point and the learned judge held that the action was maintainable. The defendant appealed.

Held, allowing the appeal: as the cause of action in this case arose earlier than six months before the death of the deceased, the action was not maintainable.

Cases referred to:-

(1) *Ong Ah Ngim* v. *Lau Kiok Kia* [1956] S.C.R. (Sarawak) 7.

(2) *Airey* v. *Airey* [1958] 2 Q.B. 300.

(3) *Rose* v. *Ford* [1937] A.C. 826.

(4) *Davies & Anor.* v. *Powell Duffryn Associated Collieries, Ltd.* [1942] A.C. 601.

FEDERAL COURT.

Daniel Tajem for the appellant.

Joseph Tong for the respondent.

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): On or about the 22nd September 1967 at about 4 p.m. the plaintiff's taxi No. S.4527 was involved in a collision with a car No. KA4937 driven by one Kadam anak Kiai at the 6½ Mile Repok Road, Sarikei.

The taxi was a total wreck as a result of the accident. About nine months later, on the 27th of June 1968 Kadam anak Kiai, hereinafter called the deceased, was fatally injured in another accident.

After the grant of representation to his estate the plaintiff commenced an action against the defendant, as administratrix of the estate of the deceased, on the 4th December 1968 claiming damages for the loss of his taxi in the accident which in his statement of claim he attributes to the negligence of the deceased.

The action was resisted by the defendant. In her defence she denies negligence and pleads that the claim is barred under section 1(3)(b) of the Law Reform (Miscellaneous Provisions) Act 1934 applicable to Sarawak under sections 2 and 3 of the Application of Laws Ordinance, Cap. 2.

By consent this objection in law came on for hearing before the High Court judge at Sibu as a preliminary point.

This appeal is against the judgment of the learned judge on this point.

Section 2 of the Application of Laws Ordinance reads:

"2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

Section 3 reads:

"3. Without prejudice to the generality of the provisions of section 2 and in amplification thereof, the Acts of the Parliament of the United Kingdom specified in the Schedule shall, to the extent specified in the second column of the Schedule, be in force in Sarawak as from the date specified in the third column of the Schedule, with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set forth in the fourth column of the Schedule."

Section 1(1) of the Law Reform (Miscellaneous Provisions) Act, 1934 is as follows:

"1. Effect of death on certain causes of action.— (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate...."

Sections 1(3) & (4) say:

"(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either —

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered."

I pause to observe that the words in section 1(3)(b), "the cause of action arose not earlier than 6 months before his death", were repealed by the Law Reform (Limitation of Actions) Act 1954. The latter Act is not in force in Sarawak.

In the case of *Ong Ah Ngim* v. *Lau Kiok Kia*[1] it was held by Bodley J. that the Fatal Accidents Act, 1846 and the Law Reform (Miscellaneous Provisions) Act, 1934 are statutes of general application within the meaning of section 2 of the Application of Laws Ordinance and are in force in Sarawak.

Section 1(3)(a) of the Law Reform Act does not apply in this case as there was no action pending at the time of deceased's death. Under section 1(3)(b) an action is maintainable if two conditions are fulfilled:

1. Proceedings in respect of the cause of action are taken within 6 months of the taking of representation to the estate of the deceased.
2. The cause of action arose not earlier than 6 months before his death.

It is not in dispute that the action was commenced within 6 months of the grant of representation to defendant.

It was submitted for the defendant that the action was not competent as the second condition could not be met. The cause of action arose on the 22nd September 1967 and the deceased came by his death on the 27th June 1968. The point was well taken and would have been decisive of the action.

On the other hand I find it difficult to unravel from the record the arguments of counsel for the plaintiff. It would appear he was submitting that the Fatal Accidents Act, 1846 and the Law Reform (Miscellaneous Provisions) Act, 1934 applied.

This misconception is due to insufficient attention to the provisions of the two Acts. It is also probable that counsel had misread the judgment in the case of *Ong Ah Ngim* v. *Lau Kiok Kia*. That was an action under the Fatal Accidents Act, 1846, and the Law Reform Act, 1934, by the administrator of a deceased person's estate who was ordered to give particulars of the person or persons for whom and on whose behalf it was brought.

In the instant case the learned judge held that the Fatal Accidents Act applied and as in his view the action was brought within the 12 month period provided for in the Act he held that the action was not barred.

With due respect the learned judge was in error in applying the Fatal Accidents Act of 1846 to this case which is a suit against the estate of a deceased tortfeasor. The law applicable in such circumstances is section 1(3)(b) of the Law Reform (Miscellaneous Provisions) Act, 1934. See *Airey* v. *Airey*[2].

In that case on February 24th, 1951 the driver of a motor car was killed in an accident in which his passenger was injured. Representation to his estate was not taken out until March 18th, 1957. On 9th September, 1957 the passenger issued a writ against the administrator of the driver's estate claiming damages

for negligence in respect of injuries received in the accident. The defendant contended that the action was barred by section 2 of the Limitation Act, 1939. It was held that the provisions in section 1(3)(b) of the Act of 1934, barring an action under the section unless brought within 6 months of the taking out of representation, constituted the period of limitation. That is the Law Reform (Miscellaneous Provisions) Act, 1934 as amended by the Law Reform (Limitation of Actions etc) Act, 1954. Even under the law as it stood unamended, the action would have been maintainable as the condition that the cause of action should not be earlier than the date of death would be satisfied. The cause of action and the date of death took place on the same day.

In the instant case, the defendant's case is that the writ was issued within the 6 month period but as the cause of action arose earlier than 6 months before the death of the tortfeasor the action was not maintainable.

The Fatal Accidents Act, 1846 applies to a different set of circumstances. At common law the maxim *actio personalis moritur cum persona* applied with the result that a person was not liable in tort for having caused the death of a human being, and if he himself died the injured person had no claim on his estate.

This anomaly of the common law was rectified in 1846 by the passing of Lord Campbell's Act (The Fatal Accidents Act). Under the statute a person became liable in an action for the pecuniary loss to the dependants of a person killed by the wrongful act of the defendant.

This action must be commenced within a year of the death and is brought on their behalf by the personal representatives of the deceased.

Later, the Law Reform (Miscellaneous Provisions) Act section 1(1) provides that where the death of a person has been caused by another's negligence, the cause of action survives for the benefit of his estate. Damages are recoverable for medical and funeral expenses, for pain and suffering by deceased, and for loss of his expectation of life. These two actions are distinct and separate.

In most cases where there are dependants, the actions are brought together and normally by the representatives. In the former case they bring it on behalf of dependants for the loss which *they* suffered. In the latter case they bring the action as representing the deceased for the loss *he* suffered.

It may happen that the same parties benefit in each case and though in section 1(5) of the Law Reform Act it is said that the rights thereunder are in addition to and not in derogation of rights under the Fatal Accidents Act the effect of this sub-section upon claims under the Fatal Accidents Act is that if damages awarded under the Law Reform Act, 1934 go either on intestacy or under the terms of the deceased's will to any dependant under the Fatal Accidents Act they will *pro tanto* reduce the amount payable to such dependant under the latter Act. (See *Rose* v. *Ford*[3] and *Davies & Anor.* v. *Powell Duffryn Associated Collieries Limited*[4]).

The only period of limitation in respect of an action under section 1(3)(b) of the Law Reform (Miscellaneous Provisions) Act, 1934 is that set out in the second limb thereof; the action should commence within 6 months of the grant of representation to the estate of the deceased. The provisions of the Sarawak Limitation Ordinance, Cap. 49 are excluded by section 5 thereof. Section 5 reads:

"5. When, by any special law now or hereafter in force in Sarawak, a period of limitation is especially prescribed for any suit, nothing herein contained shall affect or alter the period so prescribed."

The Law Reform (Miscellaneous Provisions) Act section 1(3)(b) is such a special law.

In this appeal counsel for plaintiff abandoned the position he had taken in the lower court. His only point here was that the defendant in her defence had failed to plead the requirement that the tort should have been committed within 6 months of the death of the deceased had not been fulfilled.

Apart from the fact that this point was never taken in the court below, I see no merit in it. By pleading section 1(3)(b) the defendant had sufficiently indicated the point she would raise at the trial. The plaintiff could not have been taken by surprise.

As a matter of correct pleading, the plaintiff himself should have shown in his statement of claim the facts which bring his case within section 1(3)(b) of the Law Reform (Miscellaneous Provisions) Act, 1934. See *Bullen & Leake* 11th Edition, p.461 and the specimen of pleading therein, (Form 378).

The appeal is allowed with costs here and in the court below.

Azmi L.P.: I agree with my Lord the Chief Justice that the appeal be allowed with costs here and in the court below.

The $500 deposit should be paid to the appellant towards his taxed costs.

Lee Hun Hoe J.: I have read the judgment of the Chief Justice, Borneo and I agree that the appeal be allowed.

The case of *Airey* v. *Airey*[2] should have decided the preliminary point of law on the maintainability of the action. I do not have to repeat the facts of that case and the facts of the case under appeal which were set out by the Chief Justice in his judgment. With respect the learned judge was unfortunately misled into applying the Fatal Accidents Act, 1846, which prescribes a limitation period for an entirely different kind of action. In *Airey* v. *Airey* section 1(3)(b) of the Law Reform (Miscellaneous Provisions) Act, 1934 was discussed and analysed. This section prescribes two conditions which must be fulfilled when an action is brought. The first condition is that the cause of action must have arisen not earlier than six months before the death of the tortfeasor. The second condition is that the action must have been started within six months after his personal representative took out representation. The Court of Appeal held, affirming Diplock J., as he then was, that as the action was one for which a period of limitation was prescribed by the

Act of 1934, after the coming into force of the Limitation Act 1939 the six years' period of limitation prescribed by section 2 was excluded by section 32. It also held that since proceedings were taken within six months of the letters of administration the action fell within section 1(3) of the Act 1934 and was therefore not barred.

The second condition was never in dispute in the case under appeal as the action was clearly taken within six months after the administratrix took out representation. However, the first condition was very much in dispute. But it was not in dispute in *Airey* v. *Airey*. Because the facts that the tortfeasor died on the day of the accident and that the cause of action also arose on the same day clearly show that the first condition was fulfilled. It does not appear to matter when the personal representative takes out representation so long as the action is taken within six months after representation to satisfy the period of limitation under the second condition. I can do no better than quote what Jenkin L.J. said about the first condition in *Airey* v. *Airey*:

"The *maximum* period of six months before death within which under paragraph (b) surviving torts must have been committed in order to be actionable at all after the death is not, we think, strictly a period of limitation. It is not a period within which action must be taken. It is an ambulatory restriction upon the injured party's right to prove against the estate of a deceased tortfeasor after his death, whenever he may die. In other words it imposes as a condition precedent to the maintainability of an action against the estate of a deceased tortfeasor the requirement that the tort should have been committed within six months of his death."

In the case under appeal the accident occurred on 22nd September, 1967 which was also the day the cause of action arose. The tortfeasor died as a result of a second accident on 27th June, 1968. That is nine months five days after the first accident. Therefore as the cause of action arose more than six months before the tortfeasor's death the respondent failed to satisfy the first condition. Consequently as his action does not fall within section 1(3) of the Act of 1934 it is not maintainable.

Appeal allowed.

HASSAN & ORS. v. AWANGKU SHAHBUDDIN

[O.C.J. (Rigby C.J. (Brunei), May 28, 1970]

[Brunei — Civil Suit No. 52 of 1969]

Damages — Assessment for — Injuries to arm and leg — Whether to be considered over-lapping or separate.

Damages — Leg — 2½" shortening — Compound fracture of right thigh.

Damages — Arm — Elbow — Compound fractured-dislocation of right elbow.

Negligence — Road accident — Momentary loss of power of concentration and control over vehicle.

The first plaintiff a marine workshop assistant aged 32 was involved in a road accident and suffered (a) compound fracture of the right thigh, (b) compound fractured-dislocation of the right elbow, and (c) fracture of the right humerus. He was hospitalised for two to three months and underwent three operations. His right leg was 2½' shorter. The movement of his right arm was severely restricted, and in the opinion of the surgeon "he could not function really effectively because of lack of manual dexterity in so far as his right arm is concerned and because of leg inequality in that he walks with a list to one side and he stands without his left knee being properly lodged." He claimed for general damages under two main headings (i) loss of amenities of life, together with compensation for the pain and suffering and shock he had sustained; and (ii) loss of prospective future earnings.

Held: (1) for the purpose of considering damages and compensation one must consider the joint effect of the injuries and the consequent loss of amenities of which the injured person had been deprived by the totality of those injuries;

(2) for shock, pain and suffering he had sustained and the loss of amenities he had suffered as a result of injuries to his right arm and right leg, general damages at $27,000 was assessed;

(3) for damages for loss of future earnings, one must consider the plaintiff's present salary on an incremental scale, in this case the plaintiff's prospective loss of earnings by reason of the injuries and incapacity he had suffered was assessed at $22,500.

Per Rigby C.J. (Brunei): "One knows, of course, that the defendant named in the statement of claim is not the true defendant in the action but that his name is only being used for the purpose of the action; the true defendant being the insurance company concerned. I can only say that it seems to me a remarkable way for an insurance company to carry on its legal business that it should merely give instructions to counsel to resist every issue of the claim but without any apparent instructions to counsel upon which to base and justify any defence put forward. It may be that there are some insurance companies who carry on their legal business in this manner, but one can only hope that they form a negligible and insignificant minority."

CIVIL SUIT.

K. E. Hilborne for the plaintiffs.

Y. F. Chee for the defendant.

Rigby C.J. (Brunei): Sometime between 9.45-10.00 on the evening of the 22nd August, 1969, the plaintiff Hassan bin Abdul Gani, was driving his Morris 1000 private saloon car along the Jalan Tutong Road from the direction of Brunei Town and going in the direction of Tutong. Sitting in the front seat with him was his 20 year old brother-in-law, the second plaintiff, and sitting alone in the back seat was his 4 year old son, the third plaintiff. They were all returning home from the cinema. They lived at Mile 8 on the Jalan Tutong Road. It was a fine night; the traffic was light and the plaintiff was travelling about 35 miles per hour. On approaching mile 7, the plaintiff saw two cars coming towards him, one behind the other and with dipped headlights. The cars passed each other. Shortly afterwards, the plaintiff saw another car come towards him with its headlights on and undipped. The car appeared to be zig-zagging. The plaintiff, although at the time driving on his nearside of the road, attempted to pull even further over on his nearside. The approaching car struck the front off-side of the plaintiff's car and the plaintiff knew no more until he awakened in hospital several hours later.

The police arrived at the scene shortly after the incident. They found the plaintiff's car lying in the ditch several feet off the road and facing in the opposite direction to which it had been travelling at the time of the accident i.e. facing towards Brunei. The bonnet was practically ripped off, the engine was buckled, the front bumper was dislodged, and the offside headlamp was off. The car was in fact a write-off.